Supreme Court of the United States

OCTOBER TERM, 1946

NORFOLK SOUTHERN BUS CORPORATION,
(Appellant Below)

vs.

VIRGINIA DARE TRANSPORTATION COMPANY, INC.,
(Appellee Below)

No. 1218

REPLY BRIEF TO CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES:

Virginia Dare Transportation Company, Incorporated, Appellee Below, respondent herein and petitioner in No. 1217 respectfully replies to the cross-petition of Norfolk Southern Bus Corporation, Appellant Below, and respondent in No. 1217, for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit. The cross-petition herein made reference to the transcript of record filed by the respondent herein as petitioner in No. 1217. References in this reply brief will therefore be made to the transcript of record filed in this Court in No. 1217 and for brevity and clarity, the petitioner in this cross-petition will hereinafter be referred to as "Norfolk Southern" and the respondent therein will be referred to as "Virginia Dare."

STATEMENT OF MATTER INVOLVED

To avoid unnecessary repetition, Virginia Dare hereby makes specific reference to what was said in its Petition for Writ of Certiorari in No. 1217 and particularly to the "Statement of the Matter Involved," beginning on page 1 of said petition and ending on page 6 thereof. However, attention is respectfully directed to page 4 of the cross-petition filed herein (No. 1218). There it is stated that "Norfolk Southern was to render the pick-up and delivery and terminal service for Virginia Dare without any charge if Virginia Dare would not run more than two round-trips between Norfolk and Elizabeth City each week." Attention is respectfully directed to the terms of the so-called supplementary contract (Defendant's Exhibit 2, pages 210-215 of the transcript of record) wherein it will be seen that the true import of the language of the supplementary contract was that Norfolk Southern agreed to furnish in part compensation for rights and properties surrendered, etc., terminal pick-up and delivery service to Virginia Dare at Norfolk and Elizabeth City without further charge for as many as two round-trips a week and that Virginia Dare was to pay a stipulated amount for such services for any additional trips, that is, trips in excess of two round-trips a week. This being considered one of the pivotal points of this case, it is right and proper that a correct appraisal of the contract terms should here and now be brought to the attention of the Court.

ARGUMENT IN REPLY TO CROSS-PETITION

Virginia Dare herewith reasserts its contention that this Court has jurisdiction to review the judgment here in question upon the grounds asserted in Virginia Dare's petition in No. 1217 (P. 6) and reemphasizes the reasons stated in Virginia Dare's Petition and in the Brief supporting said petition. However, it is respectfully suggested that the contention, asserted by Norfolk Southern in its cross-petition in

No. 1218 (P. 12 et seq.), that jurisdiction exists to review the judgment of the Circuit Court of Appeals upon the cross-petition of Norfolk Southern upon the grounds stated in the cross-petition (Pp. 12 & 13) is untenable.

Principally, in its cross-petition, Norfolk Southern asserts that the Circuit Court of Appeals, held that the parties were in *pari delicto* and that neither could recover, which amounted to a decision of an important question of Federal law in conflict with applicable decisions of this Court and with decisions of the Appellate Courts of other Circuits. But from the record herein and from Virginia Dare's petition in No. 1217, it will appear that Virginia Dare has repeatedly and consistently contended that there was no slightest semblance of illegality in any of the transactions which are the subject of this litigation, either by contract or by performance. Accordingly, since no illegality is attributable to Virginia Dare, it reasserts respectfully that the Circuit Court of Appeals did err in holding that such illegality (if any there were) attached to Virginia Dare, as well as to Norfolk Southern. However, still insisting there was no illegality on the part of Virginia Dare, it is apparent from a study of cases cited by Norfolk Southern in its cross-petition that such decisions are not apposite to the matters herein involved.

Norfolk Southern cites *Louisville and Nashville Railroad Company* v *Motley*, 219 U. S. 467, 55 L. Ed. 297. In that case, the Court had under consideration a contract made by an interstate carrier by which it agreed to issue an annual pass for life to the plaintiff and his wife in consideration of a release of a claim for damages for injuries received by the plaintiff and his wife in consequence of a collision of trains on the railroad of the defendant company. Action was brought on the contract by the plaintiff and his wife to require specific performance. The Court held that after the passage of the Commerce Act, the contract could not be

enforced against the railroad company, even though it was valid when made, for the Act prohibited charging, collecting or receiving anything but money for transportation on the defendant's railroad, and further prohibited it from demanding, collecting or receiving a greater or less different compensation for the transportation of persons or property or for any service in connection therewith than that specified *in its published schedule of rates.*

Norfolk Southern further cites *Steele* v *General Mills, Inc.*, 91 L. Ed. Adv. Sheet No. 5, page 315, decided January 6, 1947. In this case, the Court had under consideration a supplemental agreement by which a carrier agreed to transport goods for a shipper for less than the rate prescribed for common motor carriers. The carrier later brought suit to recover the full rate fixed by the general orders of the Railroad Commission of the State of Texas, prescribing common carrier rates. Mr. Justice Black, for the Court, concluded that the carrier was entitled to recover the full rate fixed by the Commission.

Both the *Motley* Case and the *Steele* Case are cases involving a situation where less than the prescribed rate or published schedule of rates was charged for the transportation service afforded the shipper or user of the transportation facilities. There is no slightest suggestion in either of these cases, nor in any other of which we are aware, that the same rule of law applies to the facts presented by the record in the case at bar.

Paragraphs 2, 3 and 4 on page 13 of Norfolk Southern's cross-petition indicate a reliance on the part of Norfolk Southern upon the so-called "Transportation Policy of the United States" in support of its position that it is entitled to recover from Virginia Dare on a *quantum meruit* basis and that Virginia Dare should not escape a payment for services rendered by Norfolk Southern simply because of illegality. It is asserted by Norfolk Southern that the transportation

policy requires that all persons receiving benefits from carriers should pay for them alike and further that said policy forbids carriers to give free services. In the first place, we are unable to see why any of the reasons set out in paragraphs 2, 3 and 4 are tenable as a basis for jurisdiction, inasmuch as Norfolk Southern has sought to give to the transportation policy of the United States a restriction which it does not assert, nor which was intended to be asserted in the enactment of the Transportation Act of September 18, 1940, C. 722, Title 1, Section 1, 54 Stat. 899 (49 U. S. C., 4281). In considering and construing the transportation policy as defined in the Preamble to the Transportation Act of September 18, 1940, this Court, through Mr. Justice Rutledge, has stated in *Miss. State Horticultural Company* v *Pennsylvania Railroad Company*, 30 U. S. 356, 88 L. Ed. 96, 101:

> "The Act is affected throughout its provisions, with the object not merely of regulating the relations of carrier and shipper inter se, but of securing the general public interest in adequate non-discriminatory transportation at reasonable *rates*." (Emphasis supplied)

In this case and in *Pittsburg, CC & St. Louis RR. Co.* v *Fink*, 250 U. S. 577, 40 S. Ct. 27, 63 L. Ed. 1151, and in *Louisville and N. R. Company* v *Maxwell*, 237 U. S. 94, 35 S. Ct. 494, 59 L. Ed. 853 (in both of which, the Court had under consideration the scope of the transportation policy of the United States) the Court manifestly construed the intention of Congress as evidenced by the Preamble to the Transportation Act of September 18, 1940, to be one designed to insure the uniformity of rates and charges and to protect shippers and the general public from discriminatory charges. Nowhere, either in the statute itself or in the language of the Courts construing the same can be found any

limitation upon the right of carriers as between themselves to contract for the rendition of services not affecting or resulting in discriminatory rates to shippers or deviation from public schedules of rates and charges.

A refusal to permit Norfolk Southern to recover on its claim on a *quantum meruit* basis can in nowise result in the granting to Virginia Dare of immunity by reason of illegality nor would such a result run counter to the express prohibition in the statute forbidding carriers to give free services. The real reason for rejecting Norfolk Southern's claim is set forth in the last two paragraphs of the Circuit Court's opinion. On the facts admitted no promise to pay for these can be implied since the services were admittedly both accepted and rendered without any expectation of compensation.

Throughout a consideration of this case, it must be borne in mind:

1. That the papers which are the subject of this litigation were drawn by Norfolk Southern officials and were sent to Virginia Dare for signature (Transcript pp. 42-43, 52-53).

2. For such terminal, pick-up and delivery services as were afforded Virginia Dare, Norfolk Southern received full and adequate compensation as set out in the contracts in question; namely, the Habit Franchise (between Norfolk and Elizabeth City, which it still possesses and enjoys), the terminals which Virginia Dare had been using up to the time of the contract, and release from its (Norfolk Southern's) obligations under a previous contract. Except for the almost nominal cash paid by Norfolk Southern, the principal value to Virginia Dare was the arrangement for terminal pick-up and delivery services at Norfolk and Elizabeth City, which was largely prospective and covered a period of years ahead.

Even if illegality appeared, which is certainly not conceded by Virginia Dare, upon these facts there is neither "an escape" of a legal obligation to pay, nor an "immunity", nor did Virginia Dare receive "free services."

Since the cross-petition of Norfolk Southern accepts the holding of the Circuit Court as to the illegality of the contract arrangement but rejects the holding of the Court insofar as it applies the doctrine of *in pari delicto*, argument in this reply brief to the cross-petition has been confined to that question alone. Again it is respectfully suggested that the positions taken by Virginia Dare in this reply brief should not be construed to indicate any recession from or in contradiction of the assertions and contentions set out in Virginia Dare's petition for Writ of Certiorari and Brief in Support of Petition in No. 1217.

Respectfully,

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